

IN THE MATTER OF
THE APPLICATION OF

SOMERFORD CORPORATION FOR SPECIAL
HEARING AND SPECIAL EXCEPTION ON
PROPERTY LOCATED ON THE N/S OF E JOPPA *
ROAD, E OF MAGLEDT ROAD AND
DEVELOPMENT PLAN APPROVAL
(SOMERFORD PLACE /PDM XI-808 /
3402 EAST JOPPA ROAD)

11TH ELECTION DISTRICT
6TH COUNCILMANIC DISTRICT

* BEFORE THE

* BOARD OF APPEALS

* OF

* BALTIMORE COUNTY

* CASE NO. 00-523-SPHX AND
CASE NO. CBA-00-160

*

* * * * *

MAJORITY OPINION

This case comes to the Baltimore County Board of Appeals based on a decision of the Hearing Officer that involved three cases consolidated as permitted under Title 26, § 26 -206.1 of the *Baltimore County Code*. Case No. CBA-00-160 (File No. XI-808) involves a plan submitted by the Developer to permit development of a 6.717-acre parcel of property zoned DR 5.5 on which a sixty-four (64) bed assisted living facility (ALF) known as "Somerford Place" would be constructed. The site address is 3412 Joppa Road. This plan was approved by the Hearing Officer with restrictions.

The Developer has appealed the restriction only. Case No. 00-523-SPHX contains two matters: (1) the special exception request for an ALF in a D.R. zone; and (2) the special hearing request allowing a Residential Transition Area (RTA) to be partly located in an adjacent private yard. The special hearing request and the special exception were denied by the Hearing Officer and were heard by the Board *de novo*. This matter was heard over a five-day period, with a public deliberation held by the Board members on January 23, 2001. The Petitioners, Raymond G. Burton, David L. Chatman, Barbara A. Chatman, Lloyd G. Eyler, and Somerford Corporation, formerly known as Chesapeake Healthcare Corporation, were represented by Robert A. Hoffman,

Esquire; the Protestants appeared *pro se*; and Peter M. Zimmerman, People's Counsel for Baltimore County, participated in these proceedings.

The Board will first consider the Development case. It is noted, in accordance with the letter to the Board dated January 5, 2001, that People's Counsel elected not to participate and present argument in the Development Plan of the proceeding, reserving their right to appear in development plan cases generally and in future development cases. *People's Counsel v. Crown Development Corp.*, 328 Md.303, 317 (1992).

As testified to, the Petitioners requested a waiver of the Department of Public Works (DPW) request to make certain road improvements along the south side of Magledt Road (the "Request for Waiver"). The improvements included road widening and the installation of curbs, gutters, and sidewalks along Magledt Road (the "Magledt Road Improvements"). The Petitioners requested the waiver of the Magledt Road Improvements because: (1) they are not related to the development; and (2) implementing them would destroy the vegetative screening which the community did not want removed. Testimony by Ms. Ruth Baisden, Protestant, reiterated the community's preference on this matter to the dense vegetative screening along Magledt Road versus curbs, gutters, and sidewalks.

In BCC § 26-209(d), the Board of Appeals has the authority to reverse or modify a decision of the Hearing Officer only if a finding, conclusion, or decision of the Hearing Officer:

- a. Exceeds the statutory authority or jurisdiction of the Hearing Officer;
- b. Results from an unlawful procedure;
- c. Is affected by any other error of law;

- d. Is unsupported by competent, material and substantial evidence in light of the entire record as submitted; or
- e. Is arbitrary or capricious.

The Board has reviewed the Hearing Officer's decision to determine whether the factual findings made by the Hearing Officer are supported by evidence contained in the record or whether the Hearing Officer's decision is premised upon an erroneous conclusion of law.

Monkton Preservation Association v. Gaylord Brooks Realty Corp., 107 Md. App. at 581-582; *Mortimer v. Howard Research & Development Corp.*, 83 Md. App. at 442-443. The testimony regarding a concept plan with seven (7) single family lots on Magledt Road being the supportive factor in the DPW's decision to require the Magledt Road Improvements by the Petitioners was clear to the Board. Testimony was also presented that the DPW knew of the removal of the seven (7) lots on Magledt Road due to community meetings. Even so, the DPW still insisted on the Magledt Road Improvements, and this is the only evidence upon which the Hearing Officer based his decision. Once the Petitioners eliminated the seven single-family dwellings from their proposal, the DPW did not change its position.

The Board acknowledges that, if the DPW had no longer required the Magledt Road Improvements, the Hearing Officer's decision would have been arbitrary. Based on the fact that there was no new evidence or testimony, he was not arbitrary or capricious in his decision based on what he heard and the information he had. The Board feels, however, that we do not have sufficient grounds for overturning the Hearing Officer's decision on this matter, although the need for the Magledt Road Improvements appears unclear.

Prior to hearing Case No. 00-523-SPHX on the special exception, the Petitioners made a motion for a legal determination of the zoning classification for the proposed ALF. The Board, after hearing argument from both sides, held a deliberation from the bench on the matter of whether or not there is only a Class A or Class B ALF; or are there actually three (3) types, being ALF Class A, ALF Class B, and ALF other than Class A/B.

The Board ruled that the ALF falls under ALF other than Class A/B, and therefore the performance standards as set out in BCZR § 432.1 do not apply.

The case then proceeded under BCZR § 502.1 for special exception. The proposed use is permitted in this zone by special exception pursuant to § 423.1.A.4 of the BCZR. Special exceptions are approved in accordance with BCZR § 502.1. At this point in the proceedings, People's Counsel filed a **Motion for Reconsideration of Ruling as to Class B Assisted Living Facility and BCZR 432.5 Performance Standards Generally**, which was deliberated as part of the scheduled public deliberation. The Board determined and ruled unanimously to stand as originally decided.

With respect to the request for Special Exception, the Board is bound by BCZR § Section 502, specifically Sections 502.1 and 502.2, that read:

502.1--Before any Special Exception may be granted, it must appear that the use for which the Special Exception is requested will not:

- A. Be detrimental to the health, safety, or general welfare of the locality involved;
- B. Tend to create congestion in roads, streets or alleys therein;
- C. Create a potential hazard from fire, panic or other dangers;

- D. Tend to overcrowd land and cause undue concentration of population;
- E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements;
- F. Interfere with adequate light and air;
- G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations;
- H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations; nor
- I. Be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C. 2, R.C. 4, R.C. 5 or R.C. 7 zone.

502.2-- In granting any special exception, the zoning commissioner or the board of zoning appeals, upon appeal, shall impose such conditions, restrictions, or regulations as may be deemed necessary or advisable for the protection of surrounding and neighboring properties. The owners, lessees or tenants of the property for which a special exception is granted, if required by the zoning commissioner, or board of zoning appeals, upon appeal, shall enter into an agreement in writing with said zoning commissioner and/or the county commissioners of Baltimore County, stipulating the conditions, restrictions, or regulations governing such special exception, the same to be recorded among the land records of Baltimore County. The cost of such agreement and the cost of recording thereof shall be borne by the party requesting such special exception. When so recorded, said agreement shall govern the exercise of the special exception as granted, as to such property, by any person, firm or corporation, regardless of subsequent sale, lease, assignment or other transfer.

In reaching a decision, the Board reviewed where the burden lay (or which party must assume the burden of proof). The Petitioners must show that they meet all of the requirements of BCZR § 502.1; if the Protestant raises an issue on not meeting requirements, the burden then shifts and the Protestant must then show definitive evidence as to how it fails. It is also evident

that the Protestants must present strong and substantial evidence that an adverse effect will result above and beyond those effects normally associated with such a special exception use regardless of its location within the zone. *Schultz v. Pritts*, 291 Md. 1 (1981)

The Board will also apply principles established by the Courts of this State relative to the conditional use, or special exception as it is generally called.

The leading case authority in Maryland is *Schultz v. Pritts*, 291 Md. 1 (1981). In that case, Judge Davidson stated:

When the legislative body determines that other uses are compatible with the permitted uses in a use district, but that the beneficial purposes such other uses serve do not outweigh their possible adverse effect, such uses are designated as conditional or special exception uses. Such uses cannot be developed if at the particular location proposed they have an adverse effect above and beyond that ordinarily associated with such uses.

* * *

The duties given to the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

* * *

If [the applicant] shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide.

Petitioners' witness Merle Wexler, an expert on ALF's and the National Director for Alzheimer's Services, testified that the proposed facility would not have an adverse impact on

the health, safety, and general welfare of the community. She also added that the residents would not own automobiles. In her expert opinion she did not feel the facility would negatively affect property values in the community. She concluded that the facility would pose no danger to the neighborhood; it would be a safe, peaceful and secure facility. On the issue of undue concentration of population, she testified that visitation to the facility would be sporadic, and during peak morning and afternoon operating hours, the maximum number of employees at the facility would be eighteen (18).

Ms. Eve Landino, an expert in the field of transportation planning, testified that she had conducted both a traffic analysis of the impact of proposed use at the proposed location and a general study of the amount of traffic generated by ALF's. Ms. Landino testified that the proposed use is a low generator of traffic, based on the analysis, and it would not adversely impact the levels of service of any surrounding intersections. It was her expert opinion that the proposed facility would not adversely impact any of the roads, streets, or alleys that surround the site.

Mr. Dean Hoover, an expert in the area of land planning, testified that there was not an undue concentration of these types of facilities within a five-(5) mile radius of the site. To support Mr. Hoover's testimony, an expert in the area of health planning, Ms. Krysta O'Hara, also concluded that there is an outstanding demand in the community for the proposed facility. Mr. Hoover stated that D.R. zones are the designated and proper locations for ALF's, and it is not unusual to find ALF's in proximity to single-family homes in Baltimore County.

Mr. Thomas Kramer, a certified landscaper and an expert in land planning, testified that

Somerford Place is a good transitional use between Joppa Road and the residential uses on Magledt Road. Mr. Hoover stated that the proposed facility would be significantly larger than any one single-family home in the area. However, it would be located on a substantially larger parcel of land. Also the density for the lot, under the zoning regulations, would allow for 36.94 density units. The proposed 64-bed facility would only utilize 17 of these units. Mr. Hoover testified that the proposed use is an unintensified use of the land and will not overcrowd the land. Mr. Kramer added the fact that the facility would be a one (1) story structure surrounded by a year-round landscape screen, and that the addition of the proposed facility would not adversely impact the neighborhood. Mr. Hoover testified the facility would be constructed in accordance with BOCA and Life Safety Codes. He concluded it would not create any hazards or dangers to the neighborhood. Testimony also supported the fact that, since facility is for elderly populations afflicted with Alzheimer's disease, it would in no way interfere with the adequate provisions for schools and parks in the community. Due to the facility's one-story construction and its location in respect to neighboring homes, Mr. Hoover concluded that the proposed facility would not interfere with adequate light and air. According to Mr. Hoover, there are no impermeable surface or vegetation retention provisions in the zoning regulations that apply to this site, other than the RTA requirements. In conclusion, Mr. Hoover stated his opinion that the proposed use is consistent not only with the D.R. zone, but with the zoning regulations as a whole.

Based upon the evidence and testimony submitted, the Board finds that the Petitioners have met the requirements of BCZR § 502.1.

Protestants' witness Mr. Ted Gunter testified that he sees the facility as an obstruction, an

overcrowding of the area.

Mr. Robert Eck thinks the facility is too large and barracks-like in appearance; that the area will be a mess; and that he was not sure if property values would change. He also stated that he is not opposed to ALF's in general; just this one. He testified that it should be located in an area with more commercial zoning.

Ms. Mary Eck sees the facility as a large commercial building. She stated that she thinks water supply in the area is insufficient to support the facility, and she feels property values will go down.

Ms. Alice Baker testified that she "just doesn't like it."

Ms. Ann Briggerman testified as to her concerns which were: the proposed facility is out of character with area, will create an increase in traffic, and will open the door for commercial development and constitutes Baltimore County point zoning.

Ms. Ruth Baisden testified about her concerns with this type of facility. She stated that, in her opinion, it is in the wrong location. It is out of character with neighborhood. It looks commercial and it promotes no neighborly type atmosphere, which conflicts with the objectives of the Master Plan.

Mr. Ray Lewis, who lives closest to the site, testified that he is opposed to anything being done on the site, but he would prefer an ALF to additional single-family homes on the site. He also believed the proposed use would have the least intrusive effect on the surrounding area.

The Board does not take any testimony lightly. It deeply appreciates community input in these cases. However, the Board finds that the Protestants presented no hard evidence to show

that the inherent negative impacts of this use would be greater here than in any other D.R. 5.5 zone.

The Board considered the Petition for Special Hearing on a *de novo* basis. The Petitioners have requested by way of a Petition for Special Hearing, a determination that a portion of the proposed facility's RTA be located in a private yard. Mr. Jay Hicks, Vice President of Somerford Corporation, testified that Somerford would retain an easement across that separate lot of record located on the southeast corner of the site to provide for and maintain the RTA. He also testified that a deed restriction would be placed on that property to prevent any new disturbance in the RTA.

Protestants claim that uniformity of ownership is required to comply with the RTA. BCZR § 1B01.A.1 provides that an RTA extends from the tract boundary into the site to be developed. Petitioners claim that regulations make no mention of ownership of land. It is therefore of no consequence under the BCZR that a portion of the RTA falls within a private yard. RTA buffers are created to provide adequate buffer areas between different housing types. The Board has ruled by majority to grant the Petition for Special Hearing with certain restrictions. These restrictions are as follows: (1) an easement in perpetuity is to be recorded in the Land Records of Baltimore County; (2) the concrete pad and shed are to be removed from the RTA buffer area; and (3) the Developer will be solely responsible for landscaping and maintaining the RTA buffer area in question for so long as the special exception use exists.

ORDER

IT IS THEREFORE this 7th day of February, 2001 by the County Board of Appeals of Baltimore County

ORDERED that the decision of the Hearing Officer dated October 6, 2000 in which the subject Development Plan was approved with restrictions, including the Magledt Road Improvements, be and the same is hereby **AFFIRMED**; and it is further

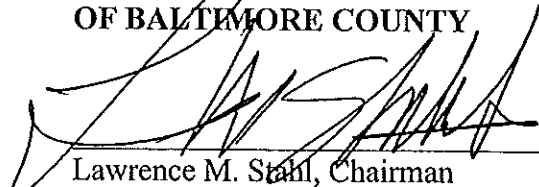
ORDERED that the Petition for Special Exception for an assisted living facility in a D.R. zone be and is hereby **GRANTED**; and it is further

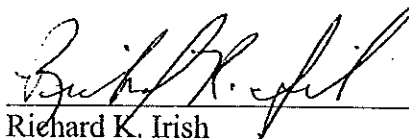
ORDERED that the Petition for Special Hearing to allow a portion of the RTA buffer to be located within a private yard area be and is hereby **GRANTED**, subject to the following conditions:

1. The easement is to be recorded in the Land Records for Baltimore County;
2. The existing concrete pad and shed are to removed from RTA buffer area; and
3. The Developer shall be responsible for landscaping and maintaining the area in question; and this condition of granting shall remain in force for so long as the special exception use exists.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the Maryland Rules of Procedure.

**COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY**


Lawrence M. Stahl, Chairman


Richard K. Irish

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CONCURRING /DISSENTING OPINION

This Board member is in concurrence with the majority of the Board in its Opinion and Order in this matter, but will respectfully dissent from their finding relative to the Petitioner's request to use a portion of an adjoining property, separately owned from the subject site, to meet the RTA (Residential Transition Area) buffer requirement. In his Order and Opinion dated October 6, 2000, Deputy Zoning Commissioner Timothy Kotroco denied this request in Case No. 00-523-SPHX.

The subject site is located at 3412 Joppa Road and consists of 6.717 acres zoned D.R. 5.5. The Petitioner's proposal calls for a 64-bed Assisted Living Facility dedicated to the care of Alzheimer's patients. The majority of the Board affirmed the Hearing Officer's approval of the Development Plan and granted the special exception for the Assisted Living Facility use. I agree with these opinions. The majority also granted the special request for the RTA buffer. On this matter alone, I do not agree for the following reasons.

The Petitioner, Somerford Corporation, has requested to use the rear yard of an adjoining residential lot, separately owned by the Chatman family, to meet the requirements of the RTA buffer. The Assisted Living Facility generates a residential transition area under *Baltimore County Zoning Regulations* (BCZR) 1B01.1B.1 because it is a use dissimilar to a single-family dwelling within 150 feet of the tract boundary. The required buffer must remain an "upgraded, uncleared, landscaped area unless otherwise directed by the hearing officer, based upon the recommendation

of the county.” BCZR 1B01.1B.1.e.(3).

The purpose of the RTA is to establish an adequate buffer between different housing types. Evidence and testimony are uncontradicted that the 28,000-square-foot ALF is a different use from that of the single-family dwelling on the Chatman lot. BCZR 1B01.B.1.a, “Definitions and purpose,” provides that:

(1) The residential transition area (RTA) is a one-hundred-foot area, including any public road or public right-of-way, extending from a D.R. zoned tract boundary into the site to be developed. [Emphasis added.]

(2) The purpose of an RTA is to assure that similar housing types are built adjacent to one another or that adequate buffers and screening are provided between dissimilar housing types.

Absent a definition of the term “tract boundary” in the regulations, I have referenced the words in *Webster’s Collegiate Dictionary* as follows: “tract” is defined as “an area either large or small”; “boundary” is defined as “something that indicates or fixes a limit or extent; specifically a bounding or separating line.” From this I conclude that a “tract boundary” means a line which separates an area either large or small. Common sense tells me that the regulation would not contemplate that the RTA buffer extend from the “tract boundary,” i.e., the “separating line,” of the subject property onto an adjacent property owned by another party. If this were the case, the responsibility for an RTA buffer would fall on the adjoining property owners rather than the developer of the subject property. Such a conclusion does not make sense.

The Petitioner argues that there is no requirement under the BCZR that the Petitioner own the land to be used as an RTA buffer and, indeed, this Petitioner argues that Somerford will obtain an easement which will be properly recorded that will restrict the rear yard as necessary to serve as

the required RTA buffer. The Petitioner will remove an existing shed and concrete pad. The Petitioner will also landscape and maintain this portion of the Chatman lot, not owned by them, so long as Somerford Corporation is in existence, as part of a recorded easement. The easement and the agreement are not in effect at this time.

The Protestants argue that the Petitioner's request is in direct conflict with the zoning regulations. They cite BCZR § 102.2 which states:

No yard space or minimum area required for a building or use shall be considered as any part of a yard space or minimum area for another building or use.

To add further complication to this specific issue before us, the Chatman lot already contains a residence which violates current setback requirements and exists as a nonconforming use. The Petitioner's request to render in perpetuity the nonconforming use of this undersized lot even smaller also appears to conflict with common zoning practice to eliminate, not expand, nonconforming uses.

It is my opinion that a transition area between two disparate uses must be buffered by the subject property introducing the disparate use. The buffer must extend into the site to be developed so that the neighboring use is not closer to the dissimilar use than it was before. The RTA is to serve as a buffer. BCZR 1B01.1.a.(1)

In this case the Petitioner wishes to use the very land which is to be buffered /protected as the transition area, and further the Petitioner would not own this land, but hold it in an easement which does not currently exist. The Petitioner's primary argument is that "ownership is blind when it comes to an RTA that is generated by a dissimilar use." (T 1/01/01, p 86) In other words the

regulations do not state explicitly that the Petitioner cannot use someone else's property to meet the regulations. Therefore, they argue, they can. I find that BCZR 102.2 negates this argument.

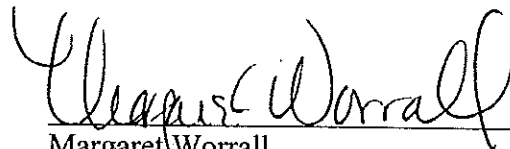
It is my opinion that the granting of such a request would set a poor precedent wherein an adjoining property owner who is not able to meet a requirement for setbacks of whatever kind may be permitted to "borrow" a neighbor's property to satisfy the regulations, in theory if not in fact.

Although the regulations properly do not address the issue of need, I further find that there is no substantive need or evidence presented by the Petitioner that creates sympathy for their request or shows that they would be hurt in any way by the denial of such a request.

The subject property of more than 6 acres has ample land area to meet the RTA requirements on property which the Petitioner owns outright. The solution seems to be one of design changes which would not be detrimental to the successful development of the ALF in any major way.

In my opinion, the Petitioner has not met his burden of proof with regard to this request. As a matter of convenience, the Petitioner simply wishes to use an adjoining property, which the Petitioner does not own, to satisfy the buffer requirement for his development.

Therefore, for the reasons set forth, I respectfully dissent from the majority opinion on the request to use adjoining property to satisfy the RTA buffer requirement.


Margaret Worrall

DATE: February 7, 2001